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20-P-1015
20-P-1016

Appeals Court

JASON EMANUEL GOMES vs. CHRISTINE MARIE CANDIDO
(and a companion case¹).

Nos. 20-P-1015 & 20-P-1016.

Bristol. April 14, 2021. - July 2, 2021.

Present: Rubin, Kinder, & Desmond, JJ.

Name. Parent and Child, Name of child. Evidence, Presumptions and burden of proof. Probate Court, Change of name, Findings by judge. Practice, Civil, Findings by judge, Presumptions and burden of proof.

Petitions filed in the Bristol Division of the Probate and Family Court Department on May 6, 2019.

The cases were heard by Richard J. McMahon, J.

Amy S. Mello for the mother.
Karen O. Young for the father.

DESMOND, J. The issue in these two cases, paired for our consideration on appeal, is whether a judge of the Probate and Family Court properly concluded that it was in the best

¹ The companion case is between the same parties.

interests of the subject three year old twins for their surname to be changed from that of their mother, which was given to them at birth, to that of their father. Because we conclude that the judge erred in applying the relevant factors, and that the father's showing was insufficient to establish that the twins' best interests were served by the name change, we reverse.

Background. The mother and the father were never married but lived together prior to, and after, the twins' birth. Both parties have their own individual surnames. The twins were born in July 2016, and were given the mother's surname. At the hospital, the father signed the twins' birth certificates, which displayed the mother's surname.

In approximately July 2018, the mother and father discontinued their relationship, and the father moved out of their shared home. Since that time, the parents have shared legal custody of the twins, and the mother has retained sole physical custody. The father, however, has been awarded liberal parenting time. Indeed, the record makes clear that the parents are quite amicable and arrange for the father to have additional parenting time when feasible.² The twins also reside with the mother's three other children. The mother's eldest daughter,

² For example, on one occasion, not during the father's parenting time, the mother was taking the children to see a movie and invited the father to join them.

who was twenty years old at the time these cases were heard, shares the mother's surname with the twins.³ The two middle children, who were twelve and fourteen years old at the time of the hearing, bear the surname of their biological father. The mother was previously married to the two middle children's biological father, and prior to their divorce, she bore his surname as well.

On May 6, 2019, the father filed petitions to change the surname of each twin. In both petitions, the father asserted as reason for the name change that it was in the best interests of the children to have their biological father's surname. The mother filed objections to both petitions, and with each objection she submitted an affidavit outlining the grounds for the objection. In the mother's affidavits, she averred that she and the father discussed the twins' surnames "multiple times before [they] even tried to get pregnant," and that they had agreed to give the twins her surname. Additionally, the mother stated in her affidavits that the twins knew their full names, including their surname, that their health insurance and medical records identified them by that surname, and that their day care was established with their given surname. She stated that she

³ The eldest daughter was given her own biological father's surname at birth, but had her surname changed to that of the mother at the age of fourteen.

"[did] not see in any way that [the twins] would benefit [by] changing [their] last name."

On October 21, 2019, the mother, pro se, and the father, represented by counsel, appeared before a Probate and Family Court judge for a pretrial conference. During the conference, the parties were sworn, and the father's attorney made numerous representations to the judge regarding the circumstances and history of the parties. The father's attorney represented to the judge that the father did not agree to giving the twins the mother's surname prior to their birth. Instead, the father's attorney stated that the father signed the children's birth certificates at the hospital only because he did not want to cause an argument at the time.

The father's attorney further argued that, because the twins were only three years old and were not enrolled in school, they did not yet identify themselves with the mother's surname. He argued that, when they did eventually enroll in school, it would be more beneficial for them to have the father's surname so that they could "identify the fact that [they have] a dad" who has given them his surname, stating that "children for the most part do bear the surname of their father." The father's attorney additionally argued that, because the twins have two half-siblings who bear their own biological father's surname, it would benefit the twins to bear their biological father's

surname. Finally, the father's attorney represented to the judge that the father is an only child, and contended that changing the twins' last name to the father's would strengthen their bond with him as well as his extended family, including their paternal grandmother, with whom the twins already had an existing and significant relationship.

The mother responded by informing the judge that, contrary to the father's counsel's representations, the parties did in fact agree to the twins' surnames before their birth. She stated further that the twins were currently in day care, and that they identified themselves with their current surname for the purpose of attendance at day care and their medical appointments. The mother took the position that "changing their last name would [not] change anything." She stated that the twins know who their father is and that each had "a wonderful relationship with" him. She further stated to the judge that "[n]ot all children have their dad's last names," and that she did not understand how changing the twins' surname at this age "would benefit them more than just confuse them."

At the conclusion of the pretrial conference, the judge indicated to the parties that, rather than having a formal trial, he was prepared to issue a decision based on the representations made during the conference, as well as the documentary submissions. Both parties assented to forgoing

trial and the judge issuing decisions based on the information he had been provided.⁴

The judge then issued two identical decrees,⁵ with identical findings of fact, ordering that each twin's surname be changed to the father's surname. Specifically, for each twin, the judge made the following findings:

"a. While the child has resided full-time with the mother since his[/her] birth, the parties share legal custody of the child and the father has endeavored to develop a meaningful relationship with the child including, but not limited to, provision of financial support and an active presence in the child's young life;

"b. The child has utilized the given name for a relatively brief period, to the age of [three] at [the] time of hearing;

"c. While the mother offered that the child has entered daycare and regularly attends medical appointments under his[/her] current name, and that the child evidently knows his[/her] current surname, the court finds that the child has not yet entered any formal schooling that may establish a public identification with his[/her] surname;

"d. The mother herself used a different surname for a period of years when she was previously married to another person; and

"e. In addition to the child here (who is a twin and that companion case is being decided simultaneously with this action) there are three other children in the mother's home:

⁴ On appeal, neither party challenges the procedure followed by the judge or his reliance on the father's counsel's representations at the pretrial conference.

⁵ The original decrees were entered on January 17, 2020. "Corrected cop[ies]" of the decrees were entered nunc pro tunc on February 24, 2020.

"One child now [twenty] years of age named Candido; however, this child carried the name [of her biological father] until [fourteen] years of age when [her] surname was changed to Candido;

"One child [twelve] years of age named [her biological father's surname]; and

"One child [fourteen] years of age named [her biological father's surname];

"f. Two of the other children in the mother's home . . . currently carry names that not only are names other than the child's current name here, . . . but their names are the surnames of their fathers that contribute[] substantially to the court's finding that there was inadequate testimony to indicate significant difficulties or embarrassment that may occur for the child as a result of the proposed name change."

Based on these findings, the judge concluded that changing the twins' surname to that of their father was in the twins' best interests. The mother timely appealed.

Discussion. Under G. L. c. 210, § 12, a person may file a name change petition, and typically, the petition "shall be granted unless such a change is inconsistent with public interests." However, where the petition concerns the surname of a child, "whether born to married or unmarried parents, the 'best interests' of the child standard is applicable." Cormier v. Quist, 77 Mass. App. Ct. 914, 915 (2010), quoting Petition of Two Minors for Change of Name, 65 Mass. App. Ct. 850, 856 (2006). The person filing the petition bears the burden of demonstrating that the name change is in the child's best interests. See Jones v. Roe, 33 Mass. App. Ct. 660, 664 (1992).

We have previously stated that, in considering the child's best interests, some factors to be considered "include the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent and other siblings; the length of time the child has utilized a given name; the age of the child as it may relate to his or her identification with the surname; and the difficulties and embarrassment that the child may experience from bearing the present or proposed surname." Jones, 33 Mass. App. Ct. at 664. This list, however, is not exhaustive. We have also stated that "the allocation of custodial responsibility" should be considered. Cormier, 77 Mass. App. Ct. at 916. Although we have not gone so far as to adopt a presumption in favor of the surname selected by the custodial parent, as some States have done, see id. at 916 n.2, and cases cited, we have emphasized that "chang[ing] a child's surname is a significant life decision," where custody should at least be taken into account. Id. at 916.

Furthermore, we have emphasized what should not be considered as part of the best interests analysis in a name change case. Specifically, "a court should not attribute greater weight to the father's interest in having the child bear the paternal surname than to the mother's interest in having the child bear her name." Richards v. Mason, 54 Mass. App. Ct. 568,

571 (2002), quoting Jones, 33 Mass. App. Ct. at 663. A father has no more right for a child to bear his surname than does a mother. See Jones, supra. "Indeed, consideration of parental preference does not appropriately focus the inquiry on what the child needs, nor on the effect on the child of a change in his [or her] surname." Richards, supra.

With these principles in mind, we turn to the judge's consideration of the twins' best interests in this case. While the judge identified the factors enumerated in Jones, his application of those factors was flawed. When applying each factor, the judge appeared to limit his analysis to whether changing the twins' surnames would cause them harm. Such a focus, however, improperly created a presumption in favor of the name change, and did not take into account whether a surname change would affirmatively be in the twins' best interests.

In considering the effect that a surname change would have on the twins' relationship with each parent, the judge relied on the fact that the father sought to have "a meaningful relationship" with the twins by providing them financial support and maintaining an active presence in their lives. We have specifically cautioned judges "against focusing on a father's 'compliance with his parental obligations'" when weighing a child's best interests. Cormier, 77 Mass. App. Ct. at 915, quoting Jones, 33 Mass. App. Ct. at 662. The judge further did

not appropriately consider the mother's relationship with the twins and the effect that a surname change might have on that relationship. While the judge briefly mentioned that the twins reside full time with the mother, there is no indication that the judge considered "the allocation of custodial responsibility" in determining whether the twins' best interests would be served by maintaining or changing the surname they were given at birth. Cormier, supra at 916.

Moreover, it is not clear that the judge fully considered the effect that a surname change would have on the twins' relationship with their half-siblings. The judge noted that the eldest half-sibling shared a surname with the twins, but apparently disregarded this fact because that half-sibling was given her own biological father's surname at birth, and had only changed her surname to the mother's at the age of fourteen.⁶ Furthermore, the judge noted that the two middle half-siblings were given their own biological father's surname, and the judge found this fact to weigh in favor of a surname change for the twins. But, in either scenario, the twins will have a different surname than the two middle half-siblings, and in changing the twins' surname, the twins would no longer share a surname with anyone in their household, other than each other. The fact that

⁶ By the time the twins were born, the eldest half-sibling's surname had already been changed to that of the mother.

the twins' three half-siblings were given their own fathers' surnames at birth does not speak to how changing the twins' surname to their father's would serve their best interests, or how such a change would preserve or develop the twins' relationship with their half-siblings, especially given that they currently share a surname with their eldest half-sibling. See Jones, 33 Mass. App. Ct. at 665.

Next, in considering the length of time that the twins had used their given surname, as well their identification with that name, the judge's framing of the facts suggests further that his focus was on whether changing their surname would be harmful, rather than on whether the proponent of the name change had proved that it would in fact be beneficial. The judge found that the twins had used their surname for only "a relatively brief period" of time, which is true given that they were only three years old at the time of the hearing. However, for the twins, three years was the entirety of their lives, and the mere fact that they are young does not necessarily weigh in favor of a name change. Compare Jones, 33 Mass. App. Ct. at 665 (insufficient showing that change of infant's surname to father's was in infant's best interests). Furthermore, while the judge recognized that each twin "evidently knows [his/her] current surname," he found that, because they had not yet enrolled in "formal schooling," they had not "establish[ed] a

public identification with [that] surname." While, again, it is true that the twins had not yet enrolled in "formal schooling" at the time of the hearing, it does not automatically follow that they did not have a public identification with the mother's surname, especially where they were enrolled in day care and had birth certificates with that name. The judge failed to articulate why changing a surname, which the twins knew and had grown accustomed to, would serve their best interests.

Finally, in weighing the potential embarrassment or difficulties that the twins might experience from bearing their present or proposed surname, the judge concluded that, because the mother's two middle children live in her household and bear a surname different than all the other members in the household, "there was inadequate testimony to indicate significant difficulties or embarrassment that may occur for the [twins] as a result of the proposed name change." This conclusion improperly placed the burden on the mother opposing the name change to demonstrate that changing the twins' surname would cause them some form of embarrassment or difficulty, where the onus should have been on the father to demonstrate that a name change would not only not harm the twins, but that it would actively serve their best interests. See Jones, 33 Mass. App. Ct. at 664.

Here, the father's showing failed to meet that burden. Notably, there was no showing that the bond between the father and the twins would be weakened by the twins maintaining the mother's surname. See Jones, 33 Mass. App. Ct. at 665 (considering whether maintaining child's surname would "weaken the bonds between father and child"). In fact, as both the father's attorney and the mother represented to the judge, the father currently has a significant relationship with the twins, and that relationship has apparently been unaffected by the twins not having borne his surname up to this point. The twins were given their mother's surname at birth;⁷ they have learned and grown accustomed to that surname; and they have identified with it at their day care and at medical appointments. The father's concerns that "children for the most part . . . bear the surname of their father," and that the twins, as a result, should be able to identify themselves with his surname are at odds with the trend against allowing "historic patterns of

⁷ Although the judge did not resolve the dispute between the parties whether they had agreed to give the twins the mother's surname prior to their birth, it is undisputed that the father, for whatever reason, signed the twins' birth certificates at the hospital, which displayed the mother's surname. While the parties' agreement and wishes concerning the twins' surnames prior to their birth may not have been relevant to the twins' best interests at the time of the hearing, the fact that the twins have borne the mother's surname since their birth was a highly relevant factor that should have been considered. See Jones, 33 Mass. App. Ct. at 661, 665.

patronymic naming [to] unduly favor the father." Richards, 54 Mass. App. Ct. at 572 n.6. Such speculative concerns, especially in light of ever-changing societal views, are insufficient to establish that the twins' best interests would be served by changing their surname from that of their mother to that of their father.⁸

Accordingly, the corrected decrees entered nunc pro tunc on February 24, 2020, ordering the name change of the twins are reversed.

So ordered.

⁸ In Richards, 54 Mass. App. Ct. at 572 n.6, we noted that societal views may have changed since our decision in Jones, and that "embarrassment or difficulty to a child in bearing a surname that differs from that of a custodial parent may no longer be as significant a factor as it once was." The same is true for bearing a surname that differs from that of a child's biological father. Speculation about such embarrassment or difficulty, without some concrete evidence that it in fact exists or is likely to occur, is not enough.